85-598

No. 85-

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

**October Term, 1985**

GRUMMAN OHIO CORPORATION,
GRUMMAN ALLIED INDUSTRIES, INC. and
GRUMMAN CORPORATION,

*Petitioners,*

*v.*

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the New York courts forcing Grumman to litigate before a New York court and jury a dispute with the New York City Transit Authority which is subject to arbitration under a federally-mandated disputes resolution clause, deprives Grumman of its rights under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.?*

2. Whether the refusal of the New York courts to disjoin from claims alleged in the New York Transit Authority complaint which the New York courts concluded were not subject to arbitration, claims within the Disputes clause which are clearly subject to arbitration, conflicts with the decision of this Court in *Dean Witter Reynolds, Inc.* v. *A. Lamar Byrd*, 53 U.S.L.W. 4222 (U.S. Mar. 4, 1985)?

3. Whether the New York courts misconstrued the decision of this Court in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), in attempting to apply, to a dispute between non-federal parties involving issues of fact within a federally-mandated disputes resolution clause, *Utah Construction's* distinction between claims remedial under a contract from breach of contract claims?

## PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.*

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*Pursuant to Rule 28.1 of this Court, petitioners state that the following list identifies all parent companies, subsidiaries and affiliates of each corporate petitioner:

Parent: Grumman Corporation

Subsidiaries: Grumman Ohio Corporation
Grumman Allied Industries, Inc.
Grumman Export Sales Corp.
Grumman Aerospace Corp.
Grumman Credit Corp.
Grumman Data Systems Corp.
(Division: ISC Systems, Inc.)
Grumman International, Inc.
Paumonock Development Corp.

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THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners, Grumman Ohio Corporation, Grumman Allied Industries, Inc. and Grumman Corporation (collectively "Grumman"), respectfully pray that a Writ of Certiorari issue to review the order entered in this proceeding by the Court of Appeals of the State of New York on July 9, 1985.

## OPINIONS BELOW

The September 19, 1984 order of the New York Supreme Court, Special Term (1a-7a),[1] which converted Grumman's motion to dismiss the complaint into a motion to compel arbitration and denied such motion, is unreported.

1. Citations herein to material printed in the Appendix appear as "(__ a)."

The February 19, 1985 order of the Appellate Division, First Department (8a-11a), affirming the order of the Supreme Court, is unreported. The April 23, 1985 order of the Appellate Division (12a-14a), denying Grumman's motion for leave to appeal to the Court of Appeals, also is unreported.

The July 9, 1985 order of the Court of Appeals of the State of New York (15a-17a), denying Grumman's motion for leave to appeal, is unreported.

## JURISDICTION

The order of the Court of Appeals of the State of New York was entered on July 9, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## STATUTES AND REGULATIONS INVOLVED

Section 2, Title 9, United States Code, reads as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The UMTA-mandated Disputes clause reads as follows:

> Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to UMTA a written appeal. The decision of UMTA's duly authorized representative for the determination of such appeals shall be

final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

This clause does not preclude consideration of law questions in connection with decisions provided for in this clause, provided that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

## STATEMENT OF THE CASE

This case arises out of the refusal of the plaintiffs-respondents, the City of New York, New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority and Port Authority of New York and New Jersey (collectively referred to as the "City") to submit to arbitration any of the factual issues in dispute under a series of contracts between Grumman Ohio Corporation and the City (the "City contracts") for the purchase of 1,013 Model 870 advanced design transit buses from Grumman, as required by the disputes resolution clause in the City contracts, Part I, paragraph 2.17 (the "Disputes clause").[2] The City has instead sought to try its claims in local state courts which, in turn, have countenanced the City's efforts.

The Disputes clause of the City contracts provides, *inter alia*, that "any dispute concerning a question of fact arising under this contract ... shall be decided by the Contracting Officer...." The decision of the Contracting Officer may then be appealed in writing to the Urban Mass Transportation Administration ("UMTA"), whose decision on such appeal "shall be final and conclusive unless determined by a court of competent jurisdiction

2. The full text of the Disputes clause is set forth, *supra*, pp. 2-3.

to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."

The City contracts were based on a "White Book" specification established by UMTA under the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. §§ 1601 *et seq.* *See* 42 Fed. Reg. 9,654 (1977); 42 Fed. Reg. 13,816 (1977). The "White Book," as well as the City contracts promulgated thereunder, contain detailed and extensive warranty procedures for remedying individual and fleet defects and reflect an understanding that such defects could occur during operation of the buses, which were of a new design. The "White Book" also mandated inclusion of the Disputes clause in all federally-subsidized bus contracts, including the City contracts. By mandating use of the Disputes clause in all such contracts, UMTA, which paid for approximately 80% of the purchase price of the buses, assured Grumman and other bus manufacturers participating in the federal program that any disputes under their contracts with local procuring authorities would be subject to uniform federal procedures and administrative adjudication rather than to adjudication by local courts and juries wherever their buses were sold. Nevertheless, the New York State courts have permitted the City to ignore the Disputes clause in its contracts.

The dispute which ultimately led to Grumman's invocation of the Disputes clause began on February 7, 1984, when the City abruptly and without good cause withdrew from revenue service all 851 Model 870 buses in the City's possession. Although the City's complaint is grounded on numerous legal theories, the core issue of fact central to all its claims, and which properly is subject to resolution under the Disputes clause, is whether any defects which may have existed in the buses at the time they were removed from service were remediable under the contractually-specified warranty procedures.

On May 9, 1984, after it had become clear that no agreement between the parties was possible, Grumman submitted this issue to the City's contracting officer, thereby initiating the first step in

the Disputes clause procedures. The City responded to Grumman's invocation of the arbitration proceedings of the Disputes clause by, one day later, initiating a lawsuit against Grumman in the Supreme Court of the State of New York, New York County. Grumman's attempt to pursue this administrative remedy, granted to it by federal law, has been thwarted by the refusal of the New York State courts to order the City to comply with its agreement to arbitrate.

**The New York State Courts' Orders**

Within the time allowed under New York procedure, Grumman moved the Supreme Court of the State of New York for an order dismissing the City's complaint or, in the alternative, staying the proceedings. The purpose of Grumman's motion to dismiss or stay was to prevent the City from circumventing the procedures for dispute resolution set forth in the Disputes clause.

On September 19, 1984, the New York Supreme Court entered an order converting Grumman's motion to dismiss the complaint or to stay the proceedings into a motion to compel arbitration, and denied said motion (1a-7a). The New York court ruled that the Disputes clause was inapplicable because the City's complaint included, *inter alia*, U.C.C., fraud and punitive damage claims which, in the opinion of the court, were not claims "the parties intended . . . to be submitted to a 'Contracting Officer' " (6a). The court also relied upon UMTA's expressed unwillingness to arbitrate the dispute (5a).[3]

3. Grumman has challenged UMTA's refusal to fulfill its obligations under the identical Disputes clause in similar litigation involving the Chicago Regional Transportation Authority ("RTA"). As discussed *infra*, RTA sued Grumman Ohio Corporation in the United States District Court for the Northern District of Illinois, alleging the same types of claims as are alleged in this action. Grumman filed the identical motion to dismiss, which was granted by District Judge Shadur. *Regional Transportation Authority* v. *Grumman Flxible Corp.*, 532 F. Supp. 665 (N.D. Ill. 1982) (the *"RTA litigation"*).

Following the federal court decision in the *RTA litigation*, UMTA, the designated arbitrator under the Disputes clause, affirmed a decision of an RTA contracting officer without according Grumman a *de novo* hearing on the merits of the dispute, as required by the Disputes clause. Grumman challenged UMTA's refusal to provide a *de novo* review in

As explained more fully below, the New York decision, which made no effort to disjoin the factual issues which were clearly subject to the Disputes clause, and which relied on the form rather than the substance of the NYCTA complaint's allegations, ignored the contrary rulings of the federal court in Chicago in the *RTA litigation* involving similar claims, the same bus procurement program and an identical contractual dispute resolution clause. The New York Court's decision also ignored the contrary rulings of several recent U.S. Supreme Court decisions emphasizing the strong federal policy in favor of arbitration and, in fact, was based entirely on an incorrect analysis of one case—*United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966)—an analysis which, as discussed below, was repudiated by the federal court in the *RTA litigation. See, infra,* Part II.

On September 24, 1984, Grumman served and filed a notice of appeal from the New York Supreme Court's order with the Appellate Division, First Department. The Appellate Division on February 19, 1985, issued an order affirming the order of the New York Supreme Court (8a-11a). Despite the importance of the federal questions presented, and the contrary rulings of the federal court in Chicago, the Appellate Division did not offer any rationale for its decision.

Grumman next sought leave from the Appellate Division to appeal to the New York Court of Appeals. This motion was denied on April 23, 1985, again without opinion (12a-14a).

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the United States District Court for the District of Columbia. The District Court for the District of Columbia denied Grumman's request for relief and Grumman appealed. *Grumman Ohio Corp.* v. *Dole, et al., appeal filed,* No. 84-5543 (D.C. Cir. Aug. 10, 1984).

On May 3, 1985, the United States Court of Appeals for the District of Columbia Circuit heard oral argument in the appeal. A decision is still pending. Should the Court of Appeals uphold Grumman's position that UMTA is required under the Disputes clause to provide *de novo* review of its dispute with the RTA, then the decision of the New York State courts also would be in conflict with the decision of the Court of Appeals for the District of Columbia Circuit, since, under such a decision, the *RTA litigation* would go to UMTA for arbitration but the New York litigation would stay in New York courts. This conflict would present an additional reason for granting this writ.

Thereafter, in accordance with New York CPLR 5513(b), Grumman filed a motion for leave to appeal to the New York Court of Appeals.The motion was filed pursuant to New York CPLR 5602(a)(1)(i) as an appeal from a final determination. Under New York law, an order which grants or denies a motion to compel arbitration constitutes a "final" determination for the purposes of a motion seeking permission to appeal to the Court of Appeals. The Court of Appeals denied Grumman's motion on July 9, 1985 (15a-17a). Like the Appellate Division, the Court of Appeals offered no opinion or explanation whatsoever.

## REASONS FOR GRANTING THE WRIT

## I.

## THE NEW YORK STATE COURTS HAVE DECIDED A QUESTION OF FEDERAL ARBITRATION LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

### A. The New York State Courts Have Misconstrued Federal Arbitration Law.

This Court's review is required to secure for Grumman its right under the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.*, to enforce the federally-mandated Disputes clause contained in all of its bus procurement contracts. Unless Grumman's petition for certiorari is granted, Grumman will be forced to engage in a protracted and costly litigation with the City in local state courts and before local juries within New York City, contrary to the agreement of the parties as set forth in the Disputes clause. It was precisely in order to avoid such a situation that UMTA mandated inclusion of a broad Disputes clause in the City contracts. Recently this Court expressly reaffirmed the strong federal policy in favor of the enforcement of arbitration agreements in *Dean Witter Reynolds, Inc.* v. *A. Lamar Byrd*, 53 U.S.L.W. 4222 (U.S. Mar. 4, 1985). The rulings below cannot be reconciled with this Court's decision in *Dean Witter* and numerous other arbitration cases presaging the same result.

The decision of the New York State court altogether disregards the strong federal policy in favor of arbitration and the uniform judicial repudiation of efforts to avoid contractual arbitration agreements by casting contract disputes in the form of tort claims. Although the New York Supreme Court's opinion recognizes that the Federal Arbitration Act is applicable since the contracts involve interstate commerce, the opinion completely disregards the settled principles of four leading decisions of this Court which have dealt with the enforcement of arbitration agreements. *Dean Witter, supra; Southland Corp.* v. *Keating,* 465 U.S. 1, 104 S.Ct. 852 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.,* 460 U.S. 1 (1983); *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.,* 388 U.S. 395 (1967). The controlling federal arbitration law principles established by these cases require a liberal interpretation of the Disputes clause and a decision in favor of arbitration of the factual questions in dispute.

As this Court stated in *Southland Corp., supra,* for example, the policy behind this protected federal right to arbitrate is "to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges or . . . by state courts or legislatures." 104 S.Ct. at 859-60 (quoting Chief Judge Lumbard's concurring opinion in *Metro Industrial Painting Corp.* v. *Terminal Construction Co.,* 287 F.2d 382, 387 (2d Cir.), *cert. denied,* 368 U.S. 817 (1961)). Consequently, the Court reasoned that "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." 104 S.Ct. at 856.

The strong federal policy in favor of arbitration was forcefully reiterated by this Court in *Dean Witter, supra.* In a unanimous decision, this Court reaffirmed Congress' unambiguous intention under the Federal Arbitration Act to enforce private agreements to arbitrate, even in cases where the mix of arbitrable and non-

arbitrable issues in a litigation could result in bifurcated proceedings.

*Dean Witter* involved a litigation where both state law claims and federal securities claims were asserted with regard to a particular series of broker-dealer transactions. A motion to compel arbitration was made with regard to the state law claims under an agreement to arbitrate. Arbitration was opposed on the ground that, under federal securities law, the federal claims were not arbitrable and the state law claims were so intertwined with the federal claims as to preclude arbitration of those claims as well.

This Court rejected such an approach and mandated arbitration of the state law claims even at the risk of duplicative proceedings. The Court based its decision on Congress' clear and unambiguous intention to require enforcement of agreements to resolve disputes by extrajudicial means:

> [P]assage of the [Federal Arbitration] Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation. Indeed, this conclusion is compelled by the Court's recent holding in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), in which we affirmed an order requiring enforcement of an arbitration agreement, even though the arbitration would result in bifurcated proceedings. That misfortune, we noted, "occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement," *id.*, at 20. See also *id.*, at 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration")....
>
> The preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered, and that concern requires that we vigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute.

53 U.S.L.W. at 4224 (footnote omitted).

The decision in *Dean Witter* emphasizes in no uncertain terms the preeminent federal policy favoring, indeed mandating, enforcement of agreements to arbitrate. It also makes clear that trying to combine an arbitrable controversy with allegedly non-arbitrable issues, as the City has here attempted to do with its spurious "fraud" claims, can in no way militate against the enforcement of the agreement to arbitrate.[4]

**B. UMTA's Unwillingness To Act As An Arbitrator Does Not Affect Grumman's Right To Arbitration.**

The New York court based its decision in part upon UMTA's unwillingness to act as arbitrator (5a). As noted above, Grumman has challenged UMTA's position in connection with the *RTA litigation* and is awaiting a decision from the United States Court of Appeals for the District of Columbia as to whether UMTA must provide *de novo* review under the Disputes clause. *Grumman Ohio Corporation* v. *Dole, et al., appeal filed,* No. 84-5543 (D.C. Cir. Aug. 10, 1984). A decision in *Dole* favorable to Grumman would undercut the New York court's reliance upon UMTA's unwillingness to act as arbitrator and would present an additional reason for granting this writ.

Even if UMTA's refusal to grant *de novo* review is upheld in *Dole*, however, it would not lessen Grumman's right to arbitration under the Disputes clause. The proper remedy for the inability or refusal of a designated arbitrator to act is to appoint a substitute arbitrator, not to nullify the arbitration agreement itself.

4. It might be noted that *Utah Construction, supra,* so greatly relied upon by the New York Supreme Court, itself inveighed against the tactic, employed in this action by the City, of trying to avoid arbitration by casting arbitrable controversies under allegedly non-arbitrable rubrics. In response to a claim that certain issues were not within the ambit of the Disputes clause involved in *Utah Construction* because they involved breaches of contract rather than items subject to contractual remedies, this Court noted: "[a]ny claim, whether within or without the disputes clause, can be couched in breach of contract language. The contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics." 384 U.S. at 419 (footnote omitted).

*Astra Footwear Industry* v. *Harwyn International, Inc.*, 442 F. Supp. 907 (S.D.N.Y.), *aff'd*, 578 F.2d 1366 (2d Cir. 1978); *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972). Accordingly, while a decision in *Dole* favorable to Grumman would present this Court with an additional reason for granting this writ, even without such a decision the New York State courts have misapplied federal arbitration law.

## II.

## THE NEW YORK COURTS HAVE MISAPPLIED THIS COURT'S HOLDING IN *UTAH CONSTRUCTION* IN A MANNER WHICH ALSO CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS IN *BETHLEHEM STEEL CORPORATION* v. *GRACE LINE, INC.*

Disregarding the vast body of authority favoring the enforcement of arbitration agreements, the New York Supreme Court based its decision almost entirely upon *Utah Construction*, which it viewed as "controlling" (5a). While the New York courts' reliance on *Utah Construction* as controlling authority is itself questionable, *see infra* Part III, nothing in *Utah Construction* justifies the New York courts' decision that the dispute in this case must be decided by a New York court and jury rather than under the administrative procedures set forth in the Disputes clause. Indeed, the manner in which the New York courts applied *Utah Construction* is in direct conflict with the decision of the United States Court of Appeals in *Bethlehem Steel Corporation* v. *Grace Line, Inc.*, 416 F.2d 1096 (D.C. Cir. 1969).

In *Bethlehem Steel* the Court of Appeals for the District of Columbia applied *Utah Construction* to a disputes clause contained in a contract in which Bethlehem Steel agreed to build ships for Grace Line. The disputes clause was similar to the clause contained in the contracts between Grumman and the

City. The disputes clause in *Bethlehem Steel* required the parties to submit disputes "arising under the contract" to the Maritime Administration, which subsidized the construction of the ships.

Grace Line sued Bethlehem Steel for breach of contract, contending that the ships were constructed with insufficient "banana reefer" (i.e. cargo) capacity. Bethlehem Steel invoked the disputes clause but the district court, viewing the controversy as not within the scope of the clause, refused to stay the proceedings pending submission of the dispute to the Maritime Administration.

The Court of Appeals reversed. Applying *Utah Construction* to determine whether the dispute was one "arising under the contract," the Court, analogizing to arbitration agreements and the doctrine of primary jurisdiction, held that the district court, in deciding whether the banana reefer dispute was within the scope of the disputes clause, should refer the matter to the Maritime Administration for a determination as to whether the claimed defect could be remedied under the contract's warranty provisions.

The New York courts' refusal in this litigation similarly to refer to UMTA the issue of whether the defects claimed by the City are remediable under the warranty provisions of the contracts is based upon a misapplication of *Utah Construction* and also conflicts with *Bethlehem Steel*. This error is further illustrated by the manner in which the identical issue was treated by the United States District Court for the Northern District of Illinois in the *RTA litigation*. The RTA brought suit against Grumman Ohio Corporation purporting to allege similar claims for breach of contract, fraud, and punitive damages as are asserted in the instant action. RTA's purported claims also arose in connection with the same bus procurement program and a contract that is identical in all material respects to the City contracts at issue in this litigation, and which included the identical UMTA-mandated Disputes clause provision contained in the UMTA-promulgated "White Book."

Based on the identical *Utah Construction* analysis which the New York courts purport to follow, District Judge Shadur, in the *RTA litigation*, granting the identical motion to dismiss which was rejected by the New York courts in this litigation, has come to the diametrically opposite conclusion: that the *Utah Construction* case requires submission of this type of dispute to the administrative process set forth in the Disputes clause. Unlike the state courts in this action, the federal court in the *RTA litigation* was not misled by counsel's artful efforts to disguise the contractual issues in dispute as torts. The focus of the federal court was on the core facts at issue, the specifics of the contractual undertakings, and the language of the Disputes clause; it was not on the complaint's legal theories or rhetoric.

District Judge Shadur looked to the contract's extensive warranty provisions and concluded that the contract "demonstrates that the parties *anticipated* the need to repair defective buses and specifically provided for such a situation in the Agreement. In *Utah Construction* terms, RTA's claim appears 'redressable under specific contract adjustment provisions.' Thus, the disputes clause requires that RTA first exhaust its administrative remedy." 532 F. Supp. at 666. Judge Shadur also relied upon *Bethlehem Steel* and did exactly what was ordered in that case: he required that the disputes be addressed in the first instance at the administrative level.

The federal rulings make it absolutely clear that under the exact same UMTA-mandated contract as is involved in this case, the factual issues in dispute in Chicago are subject to the Disputes clause procedures and should not be decided by courts and juries. Although the federal court has held in Grumman's favor in the *RTA litigation*, the opposite result has been reached in the New York State courts. Review by this Court, therefore, is necessary to provide a uniform federal rule and to assure Grumman that its rights under federal law are not violated in State court proceedings. Whether a case will be tried by jury or by arbitration should not "depend on the courthouse where suit is brought." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203-04 (1956).

## III.

## THIS COURT SHOULD DECIDE WHETHER *UTAH CONSTRUCTION* HAS ANY APPLICATION TO ARBITRATION AGREEMENTS BETWEEN PRIVATE PARTIES.

As indicated above, the New York courts, relying almost exclusively upon *Utah Construction,* ignore relevant decisions of this Court dealing directly with the enforcement of arbitration agreements in contracts between non-federal parties. While Grumman believes that if *Utah Construction* is applicable, a proper analysis thereunder leads to results similar to those reached by Judge Shadur in the *RTA litigation,* whether *Utah Construction* even applies to the interpretation of a disputes clause contained in a contract between private (non-federal) parties is a matter of first impression in this Court. Given the strong public policy favoring the liberal application of arbitration remedies provided for in arbitration agreements, *see supra,* Part I, this Court should decide whether *Utah Construction* limits a private litigant's rights under the Federal Arbitration Act.

*Utah Construction* dealt with a specialized area of contract law—namely, federal procurement law, where the federal government was a party and the issue was whether the dispute was within the jurisdiction of a specialized board of contract appeals or the United States Court of Claims. It cannot under any circumstances, therefore, be considered the basis for denying arbitration of a dispute between private parties where the result of denying arbitration is to force the parties to litigate their disputes before non-specialized courts and local juries.

The more relevant authorities in this situation are *Dean Witter, Southland Corp., Moses H. Cone, Prima Paint Corp.* and the other cases cited above, which specifically deal with arbitration agreements between private parties and which require that all doubts be resolved in favor of arbitration.

The issues involved in this petition primarily concern the operation of substantive federal arbitration law and an interpretation of a Disputes clause contained in a contract to which the federal government is not a party. The New York courts acknowledged

the federal questions involved yet ignored or misconstrued the most relevant federal authorities which address these issues.

The federal questions involved in this proceeding are important. Aside from numerous other federal grant programs raising similar issues, UMTA itself has mandated inclusion of the identical Disputes clause in hundreds of UMTA-funded contracts between manufacturers and local transit authorities nationwide. Given the conflicting results in the *RTA litigation* and this proceeding, all parties to such contracts should be given the benefit of this Court's exposition on the federal questions involved.

Review by this Court also would be in the public interest. As has been demonstrated, public policy, as reflected in federal law, strongly favors the liberal application of arbitration remedies provided for in arbitration agreements. *See, e.g., Dean Witter, supra; Southland Corp., supra; Moses H. Cone, supra;* and *Prima Paint Corp., supra.* The decision of the New York State courts clearly runs counter to this strong public policy and foreshadows similar results in other lawsuits brought in state courts by local procurement agencies.

Finally, a determination by this Court in Grumman's favor will obviate the need for lengthy and costly litigation and provide for the resolution of the disputes at issue in this action and the RTA action by an expert body applying uniform standards and procedures on a national basis in accordance with UMTA's regulations.

In short, only review by this Court provides a means for Grumman to avoid a deprivation by the state courts of its federally-mandated and contractually-stipulated arbitration rights.

## CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should issue.

Dated: October 7, 1985

Respectfully submitted,

/s/ MILTON EISENBERG, P.C.

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# APPENDIX

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Index No. 11281/84

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Plaintiffs,*

*-against-*

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. AND GRUMMAN CORPORATION,

*Defendants.*

## NOTICE OF ENTRY

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an order and decision duly made and entered in the Supreme Court of the State of New York, County of New York, on September 19, 1984.

Dated: New York, New York
September 19, 1984

Yours, etc.,

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SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I
Index No. 11281/84

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Plaintiffs,*

*-against-*

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. AND GRUMMAN CORPORATION,

*Defendants.*

McCOOE, J.:

Defendants' motion to dismiss the complaint (CPLR 3211) is converted to a motion to compel arbitration (CPLR 7503 A). The issue is whether the subject of the action comes within the scope or coverage of the "Disputes" clause in Part I of three four-part contracts entered into between the plaintiffs and defendant Grumman Ohio (Flxible). The Court finds that is does not and denies the motion.

The complaint alleges causes of action for intentional and negligent misrepresentation (Counts I and III), breach of contract (Count II) and breach of implied warranties (Counts IV and V), arising from the sale to plaintiffs by defendant Flxible of 1013 Model 870 advanced transit buses pursuant to written contracts containing the "Disputes" clauses. The plaintiffs seek compensatory and punitive damages. The contracts were prepared by the Urban Mass Transportation Administration (UMTA), a Federal agency, which provided 80% of the funding for the buses.

Plaintiffs allege that gross mechanical and structural defects, particularly in the under carriages, fraudulently concealed, necessitated removal of the majority of the buses from service in the interest of public safety and provides the gravamen of the complaint. The defendants deny these allegations and contest the claimed necessity for removal of the buses from service.

The interpretation of the contracts, based primarily on the intent of the contracting parties, is determined by federal substantive law since the transaction involves interstate commerce. (USC Title 9 Sec. I; Matter of Black & Pola, 72 A.D. 2d 514, aff'd 50 N.Y.2d 821; Matter of Rederi (Dow Chemical Co.), 25 N.Y.2d 576; Matter of Cone v. Mills, 90 A.D.2d 31. As the Court stated in Matter of Cone v. Mills, supra, at page 33:

> Thus a New York court, applying the Federal Arbitration Act, limits its inquiry to whether there is a valid agreement to arbitrate the particular dispute. All other questions . . . are for the arbitrator.

The "Disputes" clause states:

> Except as otherwise provided in this contract, any dispute concerning a question of fact *arising under this contract* which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to UMTA a written appeal. The decision of UMTA's duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.
>
> This clause does not preclude consideration of law questions in connection with decisions provided for in this

clause, provided that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law. (Emphasis supplied).

The procedure under the Disputes clause would require the initial hearing to be held before a representative of the plaintiffs (Contracting Officer) with a right of appeal to UMTA. UMTA's undisputed policy is that (a) "the Disputes Clause was intended to allow UMTA to decide, on a *de novo* basis, only those issues directly related to the interpretation and effectiveness of the White Book Specification. It was never intended to apply to issues relating to performance or damages arising out of post-delivery problems." (Letter dated March 30, 1983 from UMTA Administrator to Grumman Flxible Corp.), and (b) that UMTA has no administrative machinery to handle a de novo hearing on the issues raised but only determine the appeal on a "reasonableness" test.

The controlling authority is United States v. Utah Const. Co., 384 U.S. 394 which, in interpreting a similar disputes clause, enunciated two principles determinative of the intstant case:

1. The intention of the contracting parties is controlling (Id at 407).
2. The words "arising under this contract" have a restrictive meaning (Id at 407, 413, 417) with the scope of administrative review not "extended to breach of contract claims not redressable under other clauses of the contract" (Id at 404). Administrative review is limited to situations "when the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract." Id at 404 n. 6.

Each contract is divided into four parts: Part I entitled "Solicitation, Offer and Award Contractual Provisions" contains numerous provisions relating to pre-delivery issues such as delays in delivery and extensions to be decided by the "Contracting Officer". See Secs. 2.4.1, 2.4.2, 2.8, 2.81, 2.82. The disputes

clause appears after these paragraphs and at the end of Part I. Plaintiffs claim a breach of contract action and breaches of implied warranties outside the contract based on statutory violations (U.C.C.). Finally they allege fraud claims seeking punitive damages which clearly are outside the contract. Part IV is entitled "Warranty Provisions" and states "Warranties in this document are in addition to any other statutory remedies or warranties imposed on the Contractor".

The distinction between the types of claims to be administratively determined and those judicially determined can be appreciated after a quotation from U.S. v. Utah, supra. The Court adopted the reasoning of the Court of Claims that "had established the jurisdiction of the Boards of Contract Appeals under the disputes clause was limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief and accordingly that the contractor need not process pure breach of contract claims through the disputes machinery before filing his court action." Id at 405. The action should be judicially determined unless all issues can be completely resolved administratively. Bethlehem Steel Corp. v. Grace Line Inc., 416 F.2d 1096, 1101.

Adopting the defendants' position would mean submitting complex factual and legal issues relating to violations of the U.C.C, fraud and punitive damages to a contracting officer. The ultimate question is whether the parties intended this type of controversy to be submitted to a "Contracting Officer". The answer is clearly No. The subject matter and the claims advanced, which are not shown to be frivolous, necessarily require each case to be sui generis and reliance by defendant on lower court cases with different claims, is not determinative.

The motion is denied for the foregoing reasons.

This Decision constitutes the Order of the Court.

Dated: September 18, 1984.

/s/ WILLIAM P. MCCOOE

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
New York County Clerk's Index No. 11281/84

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Plaintiffs-Respondents,*

*-against-*

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. AND GRUMMAN CORPORATION,

*Defendants-Appellants.*

NOTICE OF ENTRY

SIRS:

PLEASE TAKE NOTICE that annexed is a true and accurate copy of an order duly entered in the above-captioned action and filed with the Clerk of the Appellate Division of the Supreme Court of the State of New York, First Department on February 19, 1985.

Dated: New York, New York
February 19, 1985

Yours, etc.,

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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 19, 1985.

Present-Hon. JOSEPH P. SULLIVAN, JUSTICE PRESIDING,
JOHN CARRO,
SIDNEY H. ASCH,
ARNOLD L. FEIN, JUSTICES.

22309N

---

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Plaintiffs-Respondents,*

*-against-*

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. AND GRUMMAN CORPORATION,

*Defendants-Appellants.*

---

An appeal having been taken to this Court by the defendants-appellants from the order of the Supreme Court, New York County (William McCooe, J.), entered on or about September 20, 1984, which converted defendants' motion to dismiss the complaint or to stay the proceedings to a motion to compel arbitration and denied such motion, and said appeal having been argued by Milton Eisenberg, of counsel for the appellants, and by Leslie Gordon Fagen, of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

/s/ HAROLD J. REYNOLDS

Clerk.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
NEW YORK COUNTY CLERKS'S INDEX NO. 11281/84

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY

*Plaintiffs-Respondents,*

*-against-*

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. and GRUMMAN CORPORATION

*Defendants-Appellants.*

NOTICE OF ENTRY

SIRS:

PLEASE TAKE NOTICE that annexed is a true and accurate copy of an order duly entered in the above-captioned action and filed with the Clerk of the Appellate Division of the Supreme Court of the State of New York, First Department on April 23, 1985.

Dated: New York, New York
April 23, 1985

Yours, etc.,

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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 23, 1985

Present—Hon. JOSEPH P. SULLIVAN, Justice Presiding
JOHN CARRO
SIDNEY H. ASCH
ARNOLD L. FEIN, Justices

M-1444
[22209N]

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Plaintiffs-Respondents,*

*-against-*

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. AND GRUMMAN CORPORATION,

*Defendants-Appellants.*

The above-named defendants-appellants having moved for leave to appeal to the Court of Appeals from the order of this Court entered on February 19, 1985,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied with $20 cost.

ENTER:

/S/ HAROLD J. REYNOLDS
Clerk.

COURT OF APPEALS OF THE STATE OF NEW YORK
Index No. 11281/84

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Plaintiffs,*

*-against-*

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. and GRUMMAN CORPORATION,

*Defendants.*

NOTICE OF ENTRY

SIRS:

PLEASE TAKE NOTICE that the annexed is a true and accurate copy of an order entered by the Court of Appeals of the State of New York on July 9, 1985.

Dated: New York, New York
July 18, 1984

Yours, etc.,

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STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of July A.D. 1985

Present,

HON. SOL WACHTLER, *Chief Judge, presiding.*

1 Mo. No. 615

THE CITY OF NEW YORK,
NEW YORK CITY TRANSIT AUTHORITY, ET AL.,

*Respondents,*

vs.

GRUMMAN OHIO CORPORATION,
GRUMMAN ALLIED INDUSTRIES, INC.,
AND GRUMMAN CORPORATION,

*Appellants.*

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/S/ KATHRYN C. BROWN

KATHRYN C. BROWN
DEPUTY CLERK OF THE
COURT

No. 85-598

(2)

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

GRUMMAN OHIO CORPORATION,
GRUMMAN ALLIED INDUSTRIES, INC.
and GRUMMAN CORPORATION,

*Petitioners,*

—v.—

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

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*and Port Authority of New York*
*and New Jersey*

BEST AVAILABLE COPY

## COUNTER-STATEMENT OF QUESTIONS PRESENTED

Should this Court issue a Writ of Certiorari to review the New York State courts' factual finding on an extensive record that the parties to the contracts at issue did not intend to arbitrate the claims in this action by virtue of their use of a boilerplate government contract "Disputes Clause" where:

(a) the record made clear that, in rejecting a proposed routine arbitration clause in contract negotiations in favor of the standard Disputes Clause, the parties had adopted fifty years of pre-existing case law, including this Court's controlling opinion in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), holding that the Clause does not provide for arbitration, but is "limited to pre-delivery claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief," 384 U.S. at 405;

(b) the United States Urban Mass Transportation Administration, the agency which petitioner Grumman says drafted the Disputes Clause for the Contracts at issue, (i) has ruled in another Grumman litigation relating to the Chicago Regional Transportation Authority's Model 870 buses that the Clause was never intended to cover any and all disputes between the parties, (ii) has declined to adjudicate such disputes and (iii) has been upheld on these rulings by the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit; and

(c) the New York courts' decisions, which are factual in nature and consistent with well-settled case law including this Court's decision in *Utah Construction*, conflict with no decisions of this Court or any other?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-598

GRUMMAN OHIO CORPORATION,
GRUMMAN ALLIED INDUSTRIES, INC.
and GRUMMAN CORPORATION,

*Petitioners,*

—v.—

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

Respondents The City of New York, New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority and Port Authority of New York and New Jersey hereby oppose the petition of Grumman Ohio Corporation, Grumman Allied Industries, Inc. and Grumman Corporation (collectively "Grumman") for a Writ of Certiorari to the Court of Appeals of the State of New York.

## COUNTER-STATEMENT OF THE CASE

### Background

This is a case concerning claims for fraud, material breach of contract, breach of implied warranties, and negligent misrepresentation.

Respondents intend to prove in a court of law that, in a $92 million transaction in 1979, Grumman deliberately and knowingly conspired to sell unsafe and unreliable transit equipment—the defective Grumman Flxible Model 870 bus—for use by the riding public of the City of New York. Respondents' allegations are based *inter alia* on Grumman's *own* recently disclosed internal documents and admissions including previously secret pre-production test reports concluding that the Model 870 bus destined for the streets of New York suffered from defects which "could lead directly to passenger or driver injury." Complaint, R. 75.*

The result of Grumman's wrongful conduct is that, on February 7, 1984, the New York City Transit Authority permanently withdrew its fleet of 850 Model 870 buses because, after four years of repeated safety and other Model 870 bus defects, multiple fleetwide recalls and ineffective fixes, it could no longer assure the riding public of the City of New York of the safety of Grumman's bus. Id.

On May 9, 1984—not coincidentally, on the day Grumman learned that respondents intended to sue—Grumman's counsel purported to invoke the "Disputes Clause" of the three Model 870 contracts (the "Contracts") to the controversy between the parties. R. 31.

---

* Citations in the form R. ____ are citations to the Record on Appeal in the Appellate Division below.

**The Disputes Clause and the Parties' Intentions in Adopting It**

The parties adopted the Disputes Clause as part of the Contracts in 1979 in consultation with the United States Urban Mass Transportation Administration ("UMTA"). They opted for this half-century old boilerplate clause found in government procurement contracts only after the Model 870 contractor's efforts to employ a routine American Arbitration Association arbitration provision as an alternative were rejected.

In February 1977, Flxible, the predecessor of Grumman Flxible, had proposed a broad arbitration clause to determine "any and all disputes" under rules similar to those set by the American Arbitration Association.[1] But the suggestion for an arbitration clause was rejected in favor of the standard government contract Disputes Clause despite Flxible's concern at the time that the Clause provided "insufficient protection to the Contractor" in offering so limited a scope of review. *Statement of Rationale for UMTA Response to Manufacturer Comments and Requests on April 4, 1977 Issue of ADB Specifications at p. 4*, R. 834.

The resulting Disputes Clause was not written like an arbitration clause. Far from an arbitration provision, the Clause is

---

1 It wrote as follows:

> XVIV. *SECTION 2.16 DISPUTES (Page I-27)*
>
> A standard disputes provision should be developed and included within the Transit Coach Procurement Requirements to promote uniformity from state to state. Flxible can discuss this Section further and *proposes that procedures be established similar to those of the American Arbitration Association*. It may be appropriate that an APTA [Association of Public Transit Authorities] committee or panel be selected under ground rules similar to the American Arbitration rules *to determine any and all disputes*. In any event, further discussion and drafting would be needed to provide a suitable disputes clause acceptable to everyone.
>
> The Flxible Company, *Review of Baseline Advanced Design Transit Coach Specifications*, February 1, 1977 at p. 15 (emphasis added), R. 832.

subject to an exception on its face, not once mentions the word "arbitration," sets no standards for arbitration such as American Arbitration Association rules, appoints a blatantly partial rather than impartial party to resolve disputes, *i.e.*, here the contracting officer of the Transit Authority (who is the purchaser) and UMTA (who funded the purchase), and provides for only limited finality of decisions.

In agreeing to the Disputes Clause in 1979 (in nearly identical language to such clauses used in prior procurement contracts), the parties to the Contracts adopted fifty years of pre-existing case law construing the Clause, including the leading Supreme Court decision, *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966). That case law uniformly holds that the Disputes Clause is not an all-encompassing arbitration provision but is "limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief. . . ." *Utah Construction*, 384 U.S. at 405. Indeed, no court has ever applied the Clause as if it were an arbitration provision.

In this case, the parties intended the Clause to apply solely to disputes redressable under other specific Model 870 contract provisions such as those relating to written change orders, change order procedures relating to contract specifications, delays in delivery, notifications of delay and requests for extensions. Each of these many provisions expressly refers to decisions by the "contracting officer" named by the Disputes Clause. The parties did not intend to subject claims such as those made by respondents in their complaint to adjudication by the contracting officer.

As the New York Supreme Court ruled in rejecting Grumman's arguments:

> Adopting the defendants' position would mean submitting complex factual and legal issues relating to violations of the U.C.C., fraud and punitive damages to a contracting officer. *The ultimate question is whether the parties*

> *intended this type of controversy to be submitted to a "Contracting Officer." The answer is clearly No.*

Petition at 6(a) (emphasis added).

**Grumman's Petition**

Nevertheless, in its Petition, Grumman now argues in effect that the parties' contractual intentions in 1979 were to "arbitrate." Without any factual basis, and although it argued much to the contrary to the New York Supreme Court below and to three federal courts in another Model 870 litigation, it now seeks to establish that the parties intended here to reject *Utah Construction* and employ an unprecedented application of the Disputes Clause as an arbitration clause.

Sixteen New York State judges have reviewed Grumman's argument. All have rejected it based on the factual findings as to the parties' intentions in adopting the Disputes Clause in 1979.

As we now show, Grumman's Petition does not raise any significant question of federal law or identify any determination below in conflict with applicable decisions of this Court or any other to justify the granting of certiorari. It should be denied.

## REASONS FOR DENYING THE WRIT

### I

### THE NEW YORK COURTS' DECISIONS BELOW DETERMINED, ON THE SPECIFIC FACTS OF THIS CASE, THAT THE PARTIES' CONTRACTUAL INTENT WAS NOT TO SUBMIT CLAIMS SUCH AS RESPONDENTS' CLAIMS TO "ARBITRATION"

#### A. The New York Courts Found that As a Factual Matter the Parties Did Not Intend to Arbitrate

The New York courts, on the specific facts of this case and an extensive record including over 900 pages of factual materials, decided that the parties to the Contracts did not intend to "arbitrate" or otherwise extra-judicially resolve the claims in the complaint by virtue of their use of the boilerplate government contract Disputes Clause. Nevertheless, Grumman contends that the New York courts deprived it of "Federal Arbitration Act rights" in a way which conflicts with federal case law. Petition at 7-10.

In reality, any rights conferred upon Grumman by the Federal Arbitration Act (the "FAA") cannot be violated by a finding that the parties did not intend to arbitrate. The FAA was enacted first and foremost to enforce agreements. *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238, 1242 (1985). It confers no new rights, except the enforcement of rights bargained for in a contract. *See* 65 Cong. Rec. 1931 (1924) (quoted in *Dean Witter Reynolds*, 105 S. Ct. at 1242 n.7.)

As this Court stated in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967), quoting from the language of section 4 of the FAA:

> [T]he federal court is instructed to order arbitration to proceed *once it is satisfied that 'the making of the agreement for arbitration* or the failure to comply [with the arbitration agreement] *is not in issue.'*

(Emphasis added) (footnote omitted). *See Dean Witter Reynolds, Inc.*, 105 S. Ct. at 1242. The identical standard was applied by the courts below. *See* Petition at 4a.

As demonstrated below, the New York courts' factual determinations as to the parties' intentions (after giving full consideration to the FAA) do not conflict with any other judicial decision and are unworthy of this Court's review. *See United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

**1. In Entering Into the Model 870 Contracts and Agreeing to the Disputes Clause, the Parties Adopted Fifty Years of Pre-Existing Case Law, Including the Rulings of this Court, Which Demonstrate that the Disputes Clause Is Not an Arbitration Clause**

In entering into the Model 870 Contracts and agreeing to the Disputes Clause, the parties adopted fifty years of pre-existing case law which had dispositively construed the Clause. That case law, including a conclusive ruling of this Court, holds that the Disputes Clause provides only limited authority to government contracting officers to expedite the resolution of various expressly defined contract issues rather than to arbitrate any and all issues relating to the contract's subject matter.

In *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), the Government took the very position argued by Grumman here: that the Disputes Clause is an arbitration-type provision which applies to any factual or other dispute relating in any way to a procurement contract.

This Court disagreed.

The Court, relying on "an examination of uniform, continuous, and long-standing judicial and administrative construc-

tion of the disputes clause, both before and after the contract here was executed," stated that:

> [W]hen the parties signed this contract in 1953, neither could have understood that the disputes clause extended to breach of contract claims not redressable under other clauses of the contract.

384 U.S. at 404-05 (citing, *inter alia*, *Phoenix Bridge Co.* v. *United States*, 85 Ct. Cl. 603, 629-630 (1937)).

The Supreme Court identified claims "redressable under other clauses of the contract" as claims seeking relief under contract provisions (other than the Disputes Clause itself) which set contractual mechanisms for adjustment. As the Court held:

> When the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract.

384 U.S. at 404 n.6. The Court ruled that, far from an arbitration provision:

> [T]he disputes clause [is] limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief . . .

*Id.* at 405.

In response to the government's arguments concerning the language of the Disputes Clause, the Supreme Court held, in words particularly relevant here:

> [E]ven if, as an original matter, the language of the disputes clause might have been susceptible of the interpretation urged by the Government, the restrictive meaning of the words 'arising under this contract' had *long since been established when these parties used them in 1953. The question before us is what the parties*

> *intended*, not whether the construction on which they relied was erroneous.

384 U.S. at 407 (emphasis added).

This was the existing case law construction of the Disputes Clause when the parties to the Contracts agreed to the Clause (having earlier rejected an arbitration clause proposed by the contractor). No court prior to 1979 had held (or to date has held) that the Disputes Clause should be applied in the same manner as an arbitration clause. If the "restrictive meaning" of the Clause, in the words of *Utah Construction*, "had long since been established . . . in 1953," it had become even more established in 1979 when plaintiffs agreed to purchase Model 870 buses from Grumman. *See Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d 1096, 1103 (D.C. Cir. 1969) ("The restrictive meaning of the words 'arising under this contract' had long since been established when these parties used them, and upon that meaning the parties were entitled to rely in the absence of some clear indication that the words were to take on a wholly different significance.").

As the Supreme Court noted in *Utah Construction*, "the question . . . is what the parties intended," 384 U.S. at 407, and that question can only be resolved in light of the well-established meaning of the Clause. The parties in this case, as the courts ruled below, by adopting the exact language of the Disputes Clause in use for nearly fifty years, intended to adopt the limited construction of the Clause employed by every single court which has addressed it.

In applying the half-century of Disputes Clause case law, other courts have been faced with the argument, made by Grumman here, that the Clause is an arbitration clause within the meaning of the FAA. The courts have flatly rejected the argument. In *Moran Towing & Transportation Co.* v. *United States*, 290 F.2d 660 (2d Cir. 1961), and in *Aetna Insurance Co.* v. *United States*, 327 F. Supp. 865 (E.D. La. 1971), the courts held that the standard dispute clause "is not a situation covered

by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, as the Disputes Clause . . . does not provide for arbitration." *Moran Towing*, 290 F.2d at 662. As stated by the Second Circuit in *Moran Towing*, "the Disputes Clause here does not provide for arbitration, or for the appointment of arbitrators." *Id.* at 662. Similarly, in *Aetna*, the Court observed: "The 'disputes provision' is not an arbitration procedure. Unlike arbitration, it does not contemplate submission of a contested issue to an impartial arbiter." 327 F. Supp. at 866.

**2. The Parties Intended *Utah Construction* to Apply Even Though the Federal Government Was Not a Party to the Model 870 Contracts**

Undaunted, Grumman contends that *Utah Construction* and other Disputes Clause case law was not intended to apply here simply because, in contrast to the facts in *Utah Construction*, the federal government was not a party to the Model 870 Contracts. Petition at 4. But there is no factual or legal basis for this contention and the evidence demonstrates the contrary. Indeed, in 1977, when UMTA rejected the contractor's proposal for an arbitration provision in favor of a Disputes Clause, it explicitly stated that its choice was "based on procedures for handling disputes in Federal Government contracts . . . ." *Statement of Rationale For UMTA Response To Manufacturer Comments And Requests On April 5, 1977 Issue Of ADB Specifications* at 4. R. 834.

Moreover, in applying the Disputes Clause, the case law does not make Grumman's distinction between contracts in which the federal government is or is not a party. In fact, certain of the decisions applying the Disputes Clause in accordance with *Utah Construction* and cited extensively by Grumman, were disputes arising from federally funded contracts in which the federal government was not a party. Thus, in *Bethlehem Steel Corp.* v. *Grace Lines, Inc.*, 416 F.2d 1096, the court was faced with a government-funded contract between private parties which included the standard Disputes Clause. The court there

applied *Utah Construction* and other Disputes Clause decisions, not arbitration principles, to determine the scope of the clause. The same is true in *RTA* v. *Grumman Flxible Corp.*, 532 F. Supp. 665 (N.D. Ill. 1982).

Lastly, Grumman itself argued before the New York Courts below in this action and other courts in other Model 870 litigation that *Utah Construction* and its progeny applied to the Model 870 Disputes Clause. For example, Grumman contended before the New York Supreme Court, not that the Disputes Clause should be treated differently from the standard federal clause, but that:

> The Disputes Clause is identical in every material respect to the standard federal government contracts Disputes Clause, and UMTA specifically intended, by use of the standard Disputes Clause, *to adopt the disputes resolution procedures applicable to federal government contracts.*

Grumman Moving Br. at 7 (emphasis added). It further argued, citing as its first case *Utah Construction*, that the fifty years of Disputes Clause case law governed the controversy between the parties:

> A large body of United States Supreme Court decisions also holds that the typical Disputes Clause in federal government contracts, which is identical to the Disputes Clause in the NYCTA contracts, "requires utilization of the administrative procedures contractually bargained for."

Grumman Moving Br. at 21 (quoting *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 428 (1966)).

Similarly, in the series of Model 870 litigations between Grumman and the Chicago Regional Transportation Authority pending in the United States District Court for the Northern District of Illinois and the District of Columbia (the "*RTA* litigation"), Grumman also advanced *Utah Construction* as controlling and contended before the District of Columbia

Circuit Court of Appeals that "the parties themselves, must be deemed to have intended to incorporate into the [Model 870] contract the procedures mandated by this unbroken line of court decisions." Grumman Appeal Brief, *Grumman Ohio Corp.* v. *Dole*, Docket No. 84-5543 (D.C. Cir.) at 43.

Grumman's failure to provide any factual or legal basis for the argument that the Disputes Clause in the Model 870 Contracts was meant to be applied differently from every other Disputes Clause which preceded it and its own varying statements to other courts as to the parties' intentions in adopting the Clause demonstrate that the New York courts correctly ruled in respondents' favor.

### 3. The Urban Mass Transportation Administration, Which Grumman Says Drafted the Model 870 Contracts, Has Ruled that the Model 870 Disputes Clause Was Never Intended to Apply to Claims Such as Those Alleged Here and Its Refusal to Adjudicate Model 870 Claims Has Been Upheld by the District of Columbia Federal Courts

As the New York Supreme Court noted below, the United States Urban Mass Transportation Administration ("UMTA"), the very agency Grumman contends was charged with drafting and administering the Disputes Clause, has rejected Grumman's view of the parties' intentions in agreeing to the Disputes Clause.[2]

In connection with the *RTA* litigation, the UMTA Administrator defined the parties' intentions in agreeing to the Disputes Clause:

> [The Disputes Clause] was never intended to apply to issues relating to performance or damages arising out of post-delivery problems.

March 30, 1983 Letter from UMTA Administrator to Grumman Flxible at 2-3, R. 778-80. In his statement, the Adminis-

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2 UMTA's practice in this matter is entitled to great weight. One of the factors upon which this Court relied in *Utah Construction* was the practice of relevant federal agencies. 384 U.S. at 407-412.

trator distinguished between issues "primarily Federal in nature," such as the meaning of contract specifications, which come within the clause, and issues "primarily local in nature," such as post-delivery performance, which do not. *Id.*

In the *RTA* litigation, UMTA subsequently ruled that RTA's claims for damages due to repairs on its Model 870 buses and other post-delivery issues were not within the Clause. UMTA stated:

> [I] would emphasize the limited nature of my review, for this appeal does not concern the type of dispute for which the Disputes Clause was intended. Rather, *this appeal concerns matters to be resolved between the two parties in a court of competent jurisdiction under applicable State law, without UMTA involvement or reference to the Disputes Clause.*

June 17, 1983 letter from UMTA to Grumman Flxible (emphasis added), R. 785-88.

Grumman responded by suing UMTA to require it to act under the Disputes Clause in the *RTA* matter. But UMTA's position was upheld by the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit which rejected the Grumman argument that UMTA was legally obligated to resolve Model 870 disputes. *Grumman Ohio Corp.* v. *Dole*, 776 F.2d 338 (D.C. Cir. 1985).[3]

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3 In its Petition (at 6), Grumman argued that, if the D.C. Circuit ruled in its favor in the *RTA* litigation, the granting of certiorari in this matter would be indicated. However, the Circuit Court ruled against Grumman stating that:

> [A]t bottom, it makes no sense whatever in the real world to force UMTA to preside over battles in which federal interests are minimal at best.

*Grumman Ohio Corp.* v. *Dole*, 776 F.2d at 345 (1985). In the present case, the federal government no longer has any interests: its financial interest in respondents' Model 870 buses under the terms of the applicable federal grants was transferred to other property after the Model 870 fleet was withdrawn from service.

In *Grumman Ohio* v. *Dole*, the Court of Appeals stated that in interpreting the Disputes Clause "the intent of the parties obviously controls" 776 F.2d at 349 n.10 and that any determination concerning the parties' intention to "arbitrate" should be made by the trial court, *id.* at 348. Of course, the trial court in this case has already made such a factual determination.

Notwithstanding the holdings in the *RTA* litigation, Grumman argues here that the New York Courts erred because in denying Grumman's motion they relied on UMTA's "unwillingness" to serve as an "arbitrator" to resolve the present dispute. Petition at 10. But Grumman has misconstrued the New York courts' decisions. They did not decline to direct a supposed "arbitrator" to serve or to appoint a substitute simply in light of his unwillingness to serve. Rather, the New York courts relied, *inter alia*, upon the highly probative evidence as to the parties' intentions when they agreed to the Disputes Clause, furnished by UMTA's own statement concerning the clause.

**B. Under Fifty Years of Disputes Clause Case Law, Respondents' Claims Are Not Subject to Partial Adjudication by a Contracting Officer**

As a fall back to its "arbitration" contentions, Grumman argues that under *Utah Construction* the New York courts erred by not directing at least some of the fact issues in this litigation to the Disputes Clause contracting officer. Grumman cites arbitration case law in support of its argument. Petition at 10.

However, under *Utah Construction* and the applicable Disputes Clause case law, it is not enough that causes of action raise some fact issue relating to the contract to require a party to submit those claims (or that fact issue) to a contracting officer. Unless complete relief for any claim can be afforded to the parties under the provisions of the relevant contract, the Disputes Clause has no applicability to that claim whatsoever.

This Court in *Utah Construction* adopted the Court of Claims' repeatedly expressed view that:

> [T]o the extent complete relief is available under a specific contract adjustment provision . . . the controversy falls within the disputes clause . . . . *[W]hen only partial relief is available . . . the remedies under the contract are not exclusive and the contractor may secure damages in breach of contract . . . .*

*Id.* at 402 (emphasis added). *Utah Construction* has consistently been read to require that a Court may not defer to the administrative procedures afforded by the Disputes Clause unless "the controversy is fully redressable under a provision of the contract other than the disputes clause itself." *Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d at 1101.

There appears to be no serious dispute here that, if *Utah Construction* applies, none of respondents' claims in this litigation would be fully governed by the Disputes Clause. In the Complaint, respondents allege fraud, conspiracy to defraud, material breach of contract, negligent misrepresentation, and breach of implied warranties and seek unliquidated damages. They also seek relief against two Grumman defendants, Grumman Corporation and Grumman Allied, listed below, *neither of whom is even a party to the Contracts.* Under *Utah Construction* and a legion of other decisions cited below, such claims and any claims seeking such relief cannot be fully resolved under the Contracts and, accordingly, the Disputes Clause does not apply.[4]

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4 Fraud cases: *United States* v. *United States Cartridge Co.*, 78 F. Supp. 81, 83-84 (E.D. Mo. 1948) ("The parties never contracted that if defendant in the execution of a contract committed fraudulent acts, . . . liability resulting therefrom would be a matter of settlement by the Contracting Officer, or arbitration."); *International Potato Corporation* v. *United States*, 161 F. Supp. 602, 604-605 (Ct. Cl. 1958) (whether the contractor had conspired with non-signatories to defraud the government was not within the standard disputes clause); *United States* v. *Medico Indus.*, 685 F.2d 230, 232 (7th Cir. 1982) ("[A]s we had neither authority nor duty to render a decision as to an allegation of fraud, the contracting officer in this appeal had no authority or

Consistent with this case law, the New York courts below held that "[t]he action should be judicially determined unless all issues can be completely resolved administratively." Petition at 6a.

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duty to render a decision . . ."); *Jefferson Construction Co.* v. *United States*, 392 F.2d 1006, 1012 (Ct. Cl.), *cert. denied*, 393 U.S. 842 (1968) (parties cannot reasonably be said to have anticipated wrongdoing and to have agreed in advance under *Utah Construction* to forego judicial remedies in favor of a contract mechanism to vindicate such wrongdoing).

Negligence cases: *Aetna Insurance Co.* v. *United States*, 327 F. Supp. 865, 867 (E.D. La. 1971) ("[n]o 'specific contract adjustment provision' with regard to" claim of negligence).

Breach of Contract cases: *United States* v. *Utah Construction Co.*, 394 U.S. at 405 ("pure breach of contract claims" need not be "process[ed] . . . through the disputes machinery."); *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 506 n.2; *United States* v. *Reisman*, 611 F.2d 325, 329 (9th Cir. 1980) (recourse to the Contracting Officer was not "a condition precedent to a suit in court by the United States to recover damages for a total breach of the contract"); *Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d at 1101 ("claims for breach of contract . . . may be litigated in a court of competent jurisdiction without previous resort to [the disputes clause procedure]").

Breach of Warranty cases: *Ekco Products Co.* v. *United States*, 312 F.2d 768, 773 (Ct. Cl. 1963) (a claim for breach of implied warranty of suitability for intended purpose was "a claim for unliquidated damages over which . . . 'the Contracting Officer has no jurisdiction' ") (quoting Defendant's Brief); *Luria Bros. & Co.* v. *United States*, 369 F.2d 701, 709 (Ct. Cl. 1966) (contractors may bring judicial suit for damages resulting from the government's breach of implied warranties as to the accuracy of specifications furnished to the contractor).

Claims for Unliquidated Damages: *Bird & Sons, Inc.* v. *United States*, 420 F.2d 1051, 1056 (Ct. Cl. 1970) (claims seeking unliquidated damages do not fall within the clause); *Universal Ecsco Corporation* v. *United States*, 345 F.2d 586, 588 (Ct. Cl. 1965) ("conventional damage claims" not within clause).

## II

## THE NEW YORK COURTS' DECISIONS DO NOT CONFLICT WITH DECISIONS OF THIS COURT, OR ANY OTHER DECISIONS

Assuming (against all the evidence) that there was an agreement to arbitrate, Grumman advances four purportedly "conflicting" arbitration opinions by this Court—*Dean Witter Reynolds Inc.* v. *A. Lamar Byrd*, 105 S. Ct. 1238 (1985), *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967)—against which it criticizes the New York Courts' decisions. Petition at 8.

But these opinions advanced by Grumman simply do not concern the Disputes Clause or the fifty years of case law interpreting the Clause, nor indeed the issue of whether or not the parties made an agreement to arbitrate. In each of these four cases there was no dispute that the parties had agreed to routine arbitration clauses.[5] Accordingly, they do not conflict

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5 In *Dean Witter Reynolds Inc.* v. *A. Lamar Byrd*, the parties agreed that "[a]ny controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration." 105 S. Ct. at 1239.

In *Southland Corp.* v. *Keating*, the arbitration provision, the nature and coverage of which the parties did not contest, read:

> Any controversy or claim arising out of or relating to this Agreement or the breach hereof *shall be settled by arbitration in accordance with the Rules of the American Arbitration Association*. . . .

465 U.S. at 4 (emphasis added).

In *Moses H. Cone Mem. Hosp.* v. *Mercury Construction Co.*, the applicable provision read:

> All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, . . . *shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association* then obtaining unless the parties mutually agree otherwise.

460 U.S. at 5 (emphasis added).

*(Footnote continued on following page)*

with the New York Courts' decisions as to the parties' intentions in this case.

In a further effort to identify "conflicting" decisions, Grumman cites *Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d 1096, and a District Court decision from the Northern District of Illinois in the *RTA* litigation. Petition at 11-13. These decisions however, were expressly considered in the decisions of the New York courts below and are in no way in conflict with them.[6]

Thus, the *Bethlehem Steel* court, far from defining the Disputes Clause as an arbitration clause, ruled:

> That phrase—"arising under this contract"—has a lengthy history, throughout which it has commanded widespread acceptance as an unyielding limitation on administrative reference to disputes that *can be fully remedied* under some stipulation of the contract . . .

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Finally, in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, (1967), the clause read:

> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, *shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association.*

388 U.S. at 398 (emphasis added).

6 Indeed, while Grumman contends here that the *Bethlehem Steel* case is "conflicting" because it supposedly requires a reference of this dispute to the contracting officer, it argued in the *RTA* litigation before the Illinois District Court that the *Bethlehem Steel* case stood for the proposition that:

> 'claims which are adjustable under contractual provisions must be submitted to the administrative determinations prescribed by the contract, while claims for breach of contract—those not adjustable in that fashion—may be litigated in a court of competent jurisdiction without previous resort to that procedure' 416 F.2d at 1101. *Flxible and RTA apparently have no disagreement with this principle . . . .*

Grumman Reply Brief, *RTA* v. *Grumman Flxible Corp.* Docket No. 81C6974 (N.D. Ill.) at 4 (emphasis added).

416 F.2d at 1102 (emphasis added) (footnote omitted). The Circuit Court reversed the district court's stay of proceedings under the Disputes Clause only because the deficiencies of the lower court's record including the absence of evidence and findings of fact left the appellate court "unable to say, as the District Court did, that 'as a matter of law' the disputes clause does not encompass [Grace's] claim." 416 F.2d at 1104. The court stated that, in the exercise of its equitable powers, the district court should "enlist the aid" of the Maritime Administration, which was determining some of the parties' disputes in any event and had expressed a willingness to hear all of the disputes, while reserving the court's power to make the final decision on the applicability of the Clause. 416 F.2d at 1106, 1109.

Here, of course, there is a full record below including the Contracts and all their provisions upon which the New York courts relied in finding that the claims in plaintiffs' complaint did not fall with the Disputes Clause. Further, the relevant administrative agency, UMTA, is in no way presently involved in this dispute and has stated that it has no intention of adjudicating Model 870 disputes under the Clause. UMTA has been upheld by the Courts in its decision. Accordingly, the *Bethlehem Steel* case is likewise not in conflict with the New York courts' decisions.

The Illinois District Court opinion in the *RTA* litigation also provides no support for Grumman's Petition. In that action, RTA had invoked contract warranty procedures and required Grumman Flxible to repair the undercarriages of its buses. After the repair, RTA brought suit contending that the Grumman repairs did not make it whole and sought damages for storage, security services and leasing replacement buses during the repairs. The Court dismissed the action without prejudice because it found that RTA's claims concerning warranty repairs were "anticipated" by the parties and thus *might* be deemed redressable under the warranty repair provisions, a question it expressly left to UMTA which at that time had not yet ruled on

the RTA claims. *RTA* v. *Grumman Flxible Corp.*, 532 F. Supp. at 666 & n.2.

Such a decision is not "conflicting" with the New York Courts' decisions:

First, after the subsequent decisions by the federal courts in the District of Columbia upholding UMTA's construction and application of the Disputes Clause, the *RTA* litigation is now, like this one, in full-blown litigation, not arbitration.

Second, in the *RTA* decision, based upon Grumman's own argument at the time, the court viewed *Utah Construction* and its progeny as controlling and did not regard the Disputes Clause as an arbitration provision covering every dispute which related in any way to the Model 870 contract.

Finally, it was because RTA had willingly availed itself of the contract warranty repair procedures to require undercarriage fixes that the *RTA* court believed that RTA's claims for damages on top of Grumman's repairs were "anticipated" and might have been intended to be "redressable" solely under the contract. *RTA* v. *Grumman Flxible Corp.*, 532 F. Supp. at 666 & n.2.

Here, plaintiffs have not sought to apply the contract warranty repair procedures. Indeed, unlike RTA, the Transit Authority has permanently withdrawn its Model 870 buses from service because it believes they are unsafe and fundamentally defective and because it has no obligation to submit to endless purported "fixes"—a situation obviously not "anticipated" by the parties to the Contracts and, under *Utah Construction*, not "redressable" under their terms.

## CONCLUSION

For the foregoing reasons, the requested writ of certiorari should be denied.

Dated: New York, New York
December 26, 1985

Respectfully submitted,

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1985**

GRUMMAN OHIO CORPORATION,
GRUMMAN ALLIED INDUSTRIES, INC. and
GRUMMAN CORPORATION,

*Petitioners,*

*v.*

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## PETITIONERS' REPLY BRIEF

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No. 85-598

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

GRUMMAN OHIO CORPORATION,
GRUMMAN ALLIED INDUSTRIES, INC. and
GRUMMAN CORPORATION,

*Petitioners,*

*v.*

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## PETITIONERS' REPLY BRIEF

Petitioners, Grumman Ohio Corporation, Grumman Allied Industries, Inc. and Grumman Corporation (collectively "Grumman"), respectfully submit this reply to respondents' brief in opposition to Grumman's petition for a writ of certiorari.

### 1. The Disputes Clause Is An Arbitration Agreement Within The Scope Of The Federal Arbitration Act.

Respondents' primary argument is that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, (the "Act") has no application to this case because the Disputes clause is not an arbitration agreement enforceable under the Act. Respondents further assert that the State court found, as a factual matter, that the parties did not intend the Disputes clause to be an arbitration agreement. There is no basis for these assertions.

Respondents do not suggest that the Disputes clause, however it may be categorized, is not binding upon the parties. Rather, they claim that the clause is not an arbitration clause under the Act because it "not once mentions the word 'arbitration,'" sets no

"standards," appoints a "blatantly partial" party to resolve disputes, and for other such reasons. Resp. Brief at 4. These observations, however, do not alter the fact that the Disputes clause obligates the parties to resolve disputes within the clause in a nonjudicial forum and not, as the New York courts have required in this case, before local courts and juries. In actuality, respondents' argument finds no support even in the New York court, which acknowledged that the Disputes clause was an arbitration clause under the Act but concluded that at least some of the claims set forth in respondents' complaint were not within its terms. *See also, Corbetta Construction Co.* v. *Michigan Mutual Liability Co.*, 20 A.D.2d 375, 379, 247 N.Y.S.2d 288, 292 (1st Dept. 1964), *aff'd*, 15 N.Y.2d 888, 258 N.Y.S.2d 423 (1965) ("Although [the Disputes clause provides that] the 'arbitrator' is an agency of one of the contracting parties, that makes it no less an arbitration; and if the parties agree on such method of determination, as they did here, it is perfectly legal and proper"). Other courts have likewise characterized the Disputes clause as an arbitration clause. *See e.g., Humphreys & Harding, Inc.* v. *Pittsburgh-Des Moines Steel Co.*, 397 F.2d 227, 231 (4th Cir. 1968); *Trans-Continental & Western Air, Inc.*v. *Parker*, 144 F.2d 735, 736 (8th Cir. 1944); *Grinnell Fire Protection Systems Co.* v. *Regents of the University of California*, 554 F. Supp. 495, 499 (N.D. Cal. 1982); *Wymard* v. *McCloskey & Co.*, 190 F. Supp. 420, 425 (E.D. Pa. 1960), *aff'd*, 292 F.2d 839 (3d Cir. 1961).[1]

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1. Respondents' reliance upon *Moran Towing & Transportation Co.* v. *United States*, 290 F.2d 660 (2d Cir. 1961), which they quote out of context, and *Aetna Insurance Co.* v. *United States*, 327 F. Supp. 865 (E.D. La. 1971), is misplaced. Neither decision "held that the standard dispute clause 'is not a situation covered by the Federal Arbitration Act . . . as the Disputes Clause . . . does not provide for arbitration,'" as stated by respondents. Resp. Brief at 9-10. Nor did either case involve a construction of the clause in the context of a contract between nonfederal parties. *Moran* held only that a stay of an action against the United States pending administrative proceedings under a Disputes clause in a contract with the United States is an interlocutory and nonappealable order. 290 F.2d at 662. In fact, the court analogized to arbitration and "the reasoning of the cases holding stays in pending actions to await the decision of arbitrators to be interlocutory and not appealable . . .," and the decision is thus consistent with Grumman's position. In *Aetna*, which also involved a federal government contract,

Moreover, contrary to respondents' suggestion, District Judge Shadur, in the *RTA litigation*, has expressly referred to the exact same Disputes clause at issue in this proceeding as an "arbitration clause," *Regional Transportation Authority* v. *Grumman Ohio Corporation*, No. 83-C-4399, Memorandum Opinion and Order at 8, (N.D. Ill. Jan. 18, 1985), and the majority opinion in *Grumman Ohio Corporation* v. *Dole*, 776 F.2d 338 (D.C. Cir. 1985), while holding that UMTA has no obligation to provide *de novo* review under the clause, accepts the view of the Illinois District Court that the clause covers the types of factual disputes at issue in this litigation. 776 F.2d at 344 n.4. Indeed, the court in *Dole* suggests that Grumman seek the appointment of a substitute arbitrator in the Illinois litigation. 776 F.2d at 348-49.

The factors which have led every other court to view the Disputes clause either as an arbitration clause or, in the context of disputes involving the federal government, analogous to one, also caused the State court in this litigation to view the clause as an arbitration agreement subject to the Federal Arbitration Act. The trial court on its own initiative converted Grumman's motion to dismiss into a motion to compel arbitration and recognized that the extent to which the parties' factual disputes are subject to arbitration is a matter to be determined under the Act:

> The interpretation of the contracts, based primarily on the intent of the contracting parties, is determined by federal substantive law since the transaction involves interstate commerce. (USC Title 9 Sec. I . . .)

Petition at 4a.

Respondents' assertion that the court found, as a factual matter, that the parties did not intend to arbitrate is in error. As the opinion of the New York Supreme Court, the only opinion in the case, makes clear, the court reached its conclusion as a matter of

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the court similarly viewed the Disputes clause as analogous to an arbitration agreement, but held that the Wunderlich Act, 41 U.S.C. §§321 *et seq.*, not the Federal Arbitration Act, governed the resolution of disputes to which the United States is a party. 327 F. Supp. at 866. Since the United States is not a party here, the issues in these cases have no relevance to the issue in this case.

law, relying upon *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966).

The New York court does refer also to UMTA's unwillingness to act as an arbitrator, which, as respondents point out, has been upheld in *Dole*. Respondents ignore the fact, however, that the issue in *Dole* was not whether the Disputes clause is an arbitration agreement—Judge Shadur had already ruled that the parties first had to proceed under the Disputes clause[2]—but simply whether UMTA was obligated to provide a *de novo* review under the clause. While the dissent in *Dole* would answer the latter issue affirmatively, even the majority opinion accepts Judge Shadur's ruling and goes to pains to point out that UMTA's refusal to provide *de novo* review has nothing to do with whether the Disputes clause is an arbitration agreement otherwise binding on the non-federal parties. *See, e.g.*, 776 F.2d at 349.

**2. Federal Law Requires The New York Court To Disjoin And Send To Arbitration Those Factual Disputes Within The Scope Of The Clause.**

Respondents also argue that the disputes between the parties are not subject to arbitration since, under *Utah Construction*, their claims are not fully redressable under the contract. In fact, respondents' claims may be fully redressable under the warranty provisions of the contract. Nevertheless, respondents and the court below ignore both the language of the Disputes clause and the vast body of arbitration law, including several recent decisions of this Court, requiring the court to send to arbitration those issues within the scope of the arbitration agreement, notwithstanding the presence of non-arbitrable issues. *See, e.g., Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S.Ct. 1238 (1985).

The court below, relying upon *Utah Construction*, decided that the parties could not have "intended" to submit "complex factual and legal issues relating to violations of the U.C.C., fraud and punitive damages to a contracting officer." Petition at 6a. No effort whatsoever was made to determine whether any factual

2. *Regional Transportation Authority* v. *Grumman Flxible Corp.*, 532 F. Supp. 665 (N.D. Ill. 1982).

issues in dispute were within the scope of the clause because of the mistaken view that the action "should be judicially determined unless all issues can be completely resolved administratively." *Id.*

One basic factual dispute underlies each of respondents' claims in this litigation, whether such claims are pleaded in contract, warranty or tort: whether the alleged defects in the buses removed from service by respondents are remediable under the warranty provisions of the contract. This factual dispute clearly is within the scope of the Disputes clause, which expressly applies to "any dispute concerning a question of fact arising under th[e] contract." As Judge Shadur observed in the *RTA litigation*, which involves similar factual disputes, an essentially identical contract, the exact same Disputes clause, and a plaintiff purporting to state claims in contract and tort, such disputes, even in *Utah Construction* terms, appear "redressable under specific contract adjustment provisions," namely, the warranty provisions. 532 F. Supp. at 666.

Moreover, nothing in the language of the clause, or in *Utah Construction*, indicates that the clause does not apply to "complex" issues or to factual disputes arising under the contract which also may relate "to violation of the U.C.C., fraud and punitive damages." To the contrary, this Court, in *Utah Construction*, recognized that any claim, "whether within or without the disputes clause" can be cast in breach of contract language and the contractual and statutory scheme would thereby "be too easily avoided." 384 U.S. at 419.

The New York court made no attempt to distinguish arbitral from non-arbitral issues. It thus failed to disjoin and send to arbitration those factual disputes within the scope of the clause. Even if the clause does not cover all of the "complex factual and legal issues" presented in the complaint, the failure to disjoin the arbitral issues is contrary to this Court's decision in *Dean Witter*. To the extent that the New York court's failure is based upon *Utah Construction*, this Court should resolve the apparent conflict between *Utah Construction* and *Dean Witter* in a situation

where non-federal parties agree to adopt the standard federal government Disputes clause as their arbitration agreement.

### 3. The New York Court Misapplied Utah Construction.

The *Utah Construction* case involved a contract to which the United States was a party. The Court's attempt in that case to delineate the jurisdiction of the Claims Court and the respective boards of contract appeals under the Disputes clause is relevant only to cases in which the United States is a party since disputes between non-federal parties cannot reach the Claims Court under any circumstances. The narrow and highly technical distinctions among the types of disputes subject to the Disputes clause procedures which the Court discussed were based on the clause's historical evolution rather than on its language. 394 U.S. at 407.

There is no reason for these same distinctions to be made when the language of the Disputes clause is used in contracts between private parties, as is the case here. In this situation, the clause should be interpreted as any other agreement to arbitrate and the relevant guidelines should be those found in arbitration law, not federal procurement law.

District Judge Shadur succeeded in reconciling the conflicting arbitration and procurement law principles by holding that any issue as to whether the alleged defects in the buses were remedial under the contract's warranty procedures should be decided in accordance with the arbitral procedures set forth in the clause. This is the same result reached by the court in *Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d 1096 (D.C. Cir. 1969). In this case, however, the New York courts have rejected any such approach and have instead relied entirely on federal procurement law principles to deny Grumman its rights under the Federal Arbitration Act.[3]

3. Respondents allege that "Grumman itself argued before the New York Courts below in this action and other courts in other Model 870 litigation that *Utah Construction* and its progeny applied to the Model 870 Disputes clause." Resp. Brief at 11. As respondents' brief recognizes, however, Grumman cites those portions of *Utah Construction* which discuss the *procedures* encompassed by the Disputes clause language as further evidence of the arbitral nature of the clause. Indeed, in *Dole*, the only issue was the procedures required under the clause, *i.e.*,

Respondents argue that the decision below does not conflict with *Bethlehem Steel* because here there is "a full record below including the Contracts and all their provisions upon which the New York courts relied in finding that the claims in plaintiffs' complaint did not fall within the Disputes Clause." This argument begs the question. Procedurally, both the court in *Bethlehem Steel* and the court below looked at the claims asserted and the contractual arbitration provision. Yet in *Bethlehem Steel* the court was "unable to say . . . that 'as a matter of law' the disputes clause does not encompass [Grace's] claim," 416 F.2d at 1104, while the New York court decided, as a matter of law, that none of the issues in this litigation could be resolved under the Disputes clause procedures. The State court reached this conclusion notwithstanding the diametrically opposite result in the *RTA litigation*. Respondents' suggestion that the court below made factual "findings" based on a "full record" is refuted by the State court's opinion.

Respondents also seek to distinguish *Bethlehem Steel* on the basis that UMTA does not want to adjudicate the disputes between the parties and has been upheld in its decision. As discussed above, however, UMTA's unwillingness has nothing to do with the arbitral nature or scope of the clause. Ironically, UMTA's construction of the scope of the clause is not even consistent with *Utah Construction*, since UMTA would refuse to hear any dispute which, in its opinion, does not involve "federal interests" notwithstanding that the dispute may arise under the contract within the meaning of *Utah Construction*.

The Disputes clause, on its face, provides for extra-judicial dispute resolution and clearly constitutes an arbitration agreement within the meaning of the Federal Arbitration Act. In relying exclusively upon *Utah Construction*, the State court construed the clause narrowly, contrary to the requirement under federal law that such clauses be construed liberally, in favor of

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whether the clause required UMTA to provide *de novo* review of a contracting officer's decision. To the extent the courts have concluded that *Utah Construction* does not govern the procedures for review but does govern the scope of the Disputes clause, even where the United States is not a party to the contract, they have turned that decision on its head.

arbitration. Moreover, the State court failed to send to arbitration those factual disputes clearly within the scope of the clause, as required by this Court's decision in *Dean Witter*. Finally, even if *Utah Construction* applies, a correct application of that decision would have caused the State court to submit to arbitration the question of whether the alleged defects can be remedied under the contract's warranty provisions, as was done in *Bethlehem Steel* and the *RTA litigation.*

## CONCLUSION

For the reasons stated in this reply brief as well as in Grumman's Petition for Writ of Certiorari, the requested writ should issue.

Dated: January 13, 1986

Respectfully submitted,

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